Members of the Peanut Quota Holders Ass'n v. United States, 421 F.3d 1323 (Fed. Cir. 2005). The Members sought rehearing en banc, but it was denied. 2005 U.S. App. LEXIS 29260 (Fed. Cir. 2005).

REASONS FOR GRANTING THE PETITION

(1) The court of appeals' decision conflicts with this Court's decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), because it permits the United States to retroactively transform a lease agreement, arrived at by arms-length bargaining between private parties and without government intrusion, into a forced sale of the leased property without paying just compensation to the lessor.

(2) The court of appeals' decision conflicts with this Court's decision in In *Kelo v. City of New London*, ___U.S. ___, 125 S.Ct. 2655 (June 23, 2005), because it permits the United States to take a property interest from one person and transfer it to another without paying just compensation.

QUESTION 1:

ARGUMENT: THE 2002 ACT CONSTITUTES A TAKING UNDER *EASTERN ENTERPRISES V. APFEL* BECAUSE IT IS GOVERNMENT ACTION THAT RETROACTIVELY TRANSFORMS A CONTRACTUAL LEASE ARRANGEMENT INTO AN INVOLUNTARY SALE WITHOUT PROVIDING JUST COMPENSATION

A compensable taking occurs when the United States acts to transform a lease agreement, arrived at by arms-length bargaining without government intrusion, into a forced sale of a statutory subsidy without compensation for the forced sale despite a statutory assurance that no owner/lessor who leased the subsidy would be disadvantaged as a result of the lease.

Two scenarios serve to illustrate how the 2002 Act transformed contractual leases into involuntary sales and why these involuntary sales violate the Takings Clause. In scenario 1 – after the 1996 Act but prior to the 2002 Act – Farmer A chose to *sell* (and not merely lease) his peanut quota to Farmer B, who grew peanuts and benefited from the quota he had purchased. Farmer A would receive, and Farmer B would pay, the fair market value of the property right associated with the peanut quota (or its equivalent) over the entire estimated life of the property right. In this scenario, Farmer A would have received just compensation for his property, while Farmer B would receive price supports (*i.e.*, the property right) under the terms of the 1996 Act, as well as price supports under the terms of the 2002 Act.

In scenario 2 – after the 1996 Act and again prior to the 2002 Act – Farmer A chose to lease his peanut quota to Farmer B on a year-by-year basis. Farmer B grew peanuts but either: (1) chose not to buy Farmer A's quota; (2) could not afford to do so; or (3) could not persuade Farmer A to sell. Each year, the two farmers would negotiate a price for the lease, which would reflect the fact that it was a year-to-year arrangement, with Farmer A retaining ownership of the underlying property right in the quota or its equivalent.

The 2002 Act immediately transferred Farmer A's property right to price supports to Farmer B, even though Farmer B never paid for the underlying property right and had contracted solely for a lease arrangement. In so doing, the 2002 Act transformed all leases into sales without providing compensation to the lessors, who likewise were transformed into involuntary sellers. This dramatic shift in the relationship of lessor and lessee is not the result of arms-length bargaining between private parties. It is quite the opposite. The 2002 Act ignores the contract actually struck by the farmers and turns a lease into a sale by congressional fiat. This result constitutes a taking under *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998).

Writing for the plurality in *Eastern Enterprises*, Justice O'Connor observed that:

> Our opinions in *Turner Elkhorn*,[5] *Connolly*,[6] and *Concrete Pipe*,[7] make clear that Congress has considerable leeway to fashion economic legislation, including the power to affect contractual commitments between private parties. Congress also may impose retroactive liability to some degree, particularly where it is "confined to short and limited periods required by the practicalities of producing national legislation." *Our decisions, however, have left open the possibility that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience.*

524 U.S. at 528-29 (emphasis added; internal citation omitted)

In this case, the 2002 Act imposes a severe "liability" – the sudden and complete loss of price supports – on parties who "not only could not have anticipated the liability," *id.*, but who had relied on specific statutory assurances that they would not

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[5] *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976).

[6] *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1969).

[7] *Concrete Pipe & Products, Inc. v. Constr. Laborers Pension Trust Fund*, 508 U.S. 602 (1993).

suffer any detriment from leasing their peanut quotas. Furthermore, the loss of the price supports is "substantially disproportionate" to the historical experience of the parties. *Id.*

As the complaint in this case indicates, plaintiffs Faye and Jerome Paulk farmed their land from the time they were married in 1968 until the enactment of the 2002 Act, with two exceptions. They were unable to farm because of injury in 1977, and they decided to lease their peanut quota to tenants during 1998, 2000, and 2001. JA at 2234. As Mrs. Paulk explained in the affidavit accompanying the complaint, had she and her husband not relied on the fact that leasing was permitted without penalty, they would have employed laborers to work their own land. JA at 2236. Had they done so, they would retain their right to the government subsidy that continues under the 2002 Act.

Another plaintiff, Augustus Garrett, was 69-years-old when the complaint was filed, and the farm land with his peanut quota has been in his family for his entire life. He relied on the government's statutory assurance that leasing his quota would not deprive him or diminish his property interest.

The economic reality is that the plaintiff Members and all those similarly situated could have served as general contractors and subcontracted the harvesting of their peanut crop had they any idea that, by leasing, they would lose their peanut price supports. They relied upon the specific assurances of 7 U.S.C. § 1358a (c) and (f). Subdivision (c) provided: "[t]hat in the case of a transfer of the lease the amount

of the allotment *shall be considered*, for the purpose of determining allotments after the expiration of the lease, to have been planted on the farm from which such allotment is transferred." (Emphasis added). Subdivision (f) provided:

> The lease of any part of a peanut acreage allotment determined for a farm *shall not affect the allotment* for the farm from which such allotment is transferred or the farm to which it is transferred, except with respect for the crop year or years specified in the lease. *The amount of the acreage allotment which is leased from a farm shall be considered for purposes of determining future allotments to have been planted to peanuts on the farm from which such allotment is leased* . . . .

(Emphasis added).

There can be no doubt that the 2002 Act imposed a "substantial" economic burden on the Members. *Eastern Enterprises*, 524 U.S. at 529. It completely deprived them of their price supports and, as the Court of Claims and the panel noted, the price supports are of enormous value to peanut farmers. 60 Fed. Cl., at 526; 421 F.3d at 1328.

There also can be no doubt that the 2002 Act interfered with the investment backed expectations of the Members. *Eastern Enterprises*, 524 U.S. at 532. The Members owned their land and their quotas. They had the choice of selling them, leasing them, or farming them. The statutory scheme clearly stated that, if they chose to lease the property that had been

allotted to them, the result of that economic decision would be to put them in the same position as if they had farmed themselves. The decision to lease was an economic judgment as to how best to use property. The decision relied upon a clear statutory protection.

The effect of the 2002 Act is to transform the 2002 lease retroactively into a sale of the peanut price supports. The plurality clearly stated in *Eastern Enterprises*, 524 U.S. at 532, that "[r]etroactivity is generally disfavored in the law," and there can be no doubt that the 2002 Act retroactively converted one economic transaction, a lease, into another very different transaction, a sale, without the consent of all parties to the transaction.

There also can be no doubt that, as in *Eastern Enterprises*, 524 U.S. at 537, "the nature of the governmental action in this case is quite unusual." In *Eastern Enterprises*, *id.*, the plurality noted that the statute "singles out certain employers to bear a burden that is substantial in amount." In the instant case, the 2002 Act singles out certain property owners to bear a burden that is substantial in amount and punishes them for relying on a long-standing statutory assurance that they would suffer no adverse consequences from leasing their property interest.

In sum, everything the plurality determined to constitute a taking found in *Eastern Enterprises* is present in this case and more. Congress's decision to retroactively punish the Members for leasing their property interest is highly unusual given the previous statutory guarantees that leasing not only was

permissible but also would result in no diminishment of the lessor's property interest.

Justice Kennedy, who concurred in part and dissented in part in *Eastern Enterprises*, almost certainly would have found a taking in this case. He declined to join the plurality in *Eastern Enterprises* because "[t]he Coal Act does not appropriate, transfer, or encumber an estate in land (*e.g.*, a lien on a particular piece of property), a valuable interest in an intangible (*e.g.*, intellectual property), or even a bank account or accrued interest." 524 U.S., at 540. Justice Kennedy wrote that "the Government's imposition of an obligation between private parties, or destruction of an existing obligation, must relate to a specific property interest to implicate the Takings Clause." *Id.*, at 544. It is clear that the 2002 Act both appropriates and transfers a specific property interest.

Thus, petitioners ask this Court to find that they were deprived of a compensable property interest by the 2002 Act and are entitled to just compensation under the reasoning of *Eastern Enterprises*.

QUESTION 2:

ARGUMENT: THE COURT OF APPEALS' DECISION CONFLICTS WITH THIS COURT'S DECISION IN *KELO V. CITY OF NEW LONDON* BECAUSE IT PERMITS THE GOVERNMENT TO TAKE A PROPERTY INTEREST FROM ONE PERSON AND TRANSFER IT TO ANOTHER WITHOUT PAYING JUST COMPENSATION

The court of appeals recognized that the Members *had* a property interest in their peanut quotas. It also recognized that the Members were permitted by statute to lease their property interest, and guaranteed by statute they would suffer no adverse consequences if they chose to enter into a lease arrangement. The 2002 Act took away the Members' property interest and gave it to the former lessees. This is a taking.

In *Kelo v. City of New London*, ___U.S. ___, 125 S.Ct. 2655 (June 23, 2005), the Court reviewed a development plan adopted by the City of New London in 2000 that had been touted to create new jobs, increase tax and other revenues, and revitalize an economically distressed city. To assemble the land needed for this project, the city had purchased parcels of property from willing sellers and had planned to use its eminent domain power to acquire other parcels of property from unwilling owners. Although the city also had planned to offer just compensation to the unwilling owners, those owners claimed that the involuntary transfer of property did not amount to a taking for a "public use" and thus violated the Fifth Amendment.

Justice Stevens' majority opinion began its legal analysis with the following clear statement:

> Two polar propositions are perfectly clear. On the one hand, it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation. On the other hand, it is equally clear that a State may transfer property from one private party to another if future "use by the public" is the purpose of the taking; the condemnation of land for a railroad with common-carrier duties is a familiar example.

125 S. Ct. at 2661.

Although "[n]either of these propositions . . . determine[d] the disposition" of that case, *id.*, the Court's first proposition definitely controls this one. The United States may not take the property of A (the Members) for the sole purpose of transferring it to another private party B (the lessees), even if the United States is prepared to pay just compensation. The Members' complaint is that the United States has in fact taken their property, the peanut quotas, and transferred it to their competitors, which violates the Takings Clause, and that the United States compounded that constitutional violation by failing to pay just compensation to the Members, which constitutes a separate violation of the Takings Clause. Given the fact that the government specifically assured property owners for 35 years that they would not be adversely affected by leasing their property interest, no public interest in taking away the

Members' property and giving it, without compensation, to their former lessees could conceivably be asserted.

The Court of Appeals rejected the Members' complaint, reasoning as follows:

> The question . . . is not whether the peanut quotas have aspects of property, but whether Congress must pay the owners of peanut quotas compensation when it takes steps that render the quotas less valuable, or even valueless. The answer is no, because the property interest represented by the peanut quota is entirely the product of a government program unilaterally extending benefits to the quota holders, and nothing in the terms of the statute indicated that the benefits could not be altered or extinguished at the government's election.
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> By analogy, undoubtedly food stamps in the hands of food stamp recipients are property. Theft or fraud that deprived the owner of food stamps would surely be punishable as theft or fraud directed at property. But, *the government's decision to terminate the food stamp program before the food stamps could be issued* would not give rise to an obligation to compensate prospective holders of the stamps.

421 F.3d at 1324 (emphasis added).

Although the Court of Appeals' reasoning might be sound in general, its holding in this case was clearly in error as it is based on two incorrect assumptions, first that the United States was "terminating" peanut price supports and, second, that the United States was doing so "before the . . . program" had distributed property to the Members. *Id.* In fact, the 2002 Act retains a subsidy for some peanut growers, but it transfers the subsidy in the form of price supports from some farmers, including the Members, to others. The Act takes away property from the Members because they relied on a statutory assurance that they could lease their property without penalty and transfers the property interest to former lessees who paid for a lease not for the underlying property interest.

The question, therefore, is not whether Congress may eliminate a government subsidy or welfare program generally; it is whether the government may take a property right from one holder and convey it to another in an ongoing program. The subsidy program is ongoing. The right to a peanut subsidy remains, although the word "quota" is no longer the description given to the price supports.

The Court of Appeals did not address this question, and the conflict between the reasoning of the Court of Appeals and that of this Court in *Kelo* warrants review. As Justice Kennedy's separate opinion in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 544 (1998), noted, "the Government ought not to have the capacity to give itself immunity from a takings claim by the device of requiring the transfer of property from one private owner directly to another."

In its Opposition to Appellants' Petition for Rehearing *En Banc* (Appendix C), the government argued that there was no transfer of property rights from the Members to their lessees. This argument relies on form over substance. The 2002 Act continues to offer peanut growers certain subsidies, which are as much property rights as the peanut quotas were under earlier legislation.

Moreover, the government concedes, Appendix C at 6, that the subsidy provided in the 2002 Act is tied to the previous production of peanuts. The 2002 Act establishes a subsidy by determining a "base" in pounds of peanuts that reflects production history. 7 U.S.C. § 7952. The effect of the 2002 Act is to take the "base" previously owned by the Members and transfer it to the former lessees. The government does not contest that the 2002 Act transfers to the former lessees the Members' production history allocated to them under the 1996 statute. Without a production history, there is no property right; with a production history one exists. The Members owned their production history until the 2002 Act took it away and gave it to former lessees. This is a taking under any reasonable view of what the 2002 Act actually accomplished.

Unable to argue that the 2002 Act does not take away from the Members the subsidy derived from their production history and give that subsidy to former lessees, the government argues instead that there has been no transfer of the Members' quotas, because "[t]here are no quotas". Appendix C at 7. The word "quota" is no longer used to define the property interest in the 2002 Act, but the subsidies in the 2002

Act flow directly from the production history and credits in the 1996 FAIR Act and previous statutes. Renaming the subsidy program and redefining the conditions for receipt of the subsidy cannot disguise the fact that property interests previously held by lessors have been transferred without compensation by the 2002 Act to former lessees.

Just compensation is particularly appropriate in this case because there is no question that, had the Members hired the lessees to do the farming on the Members' land, the Members would retain their right to a continuing subsidy under the 2002 Act. The only reason the Members engaged in a lease arrangement rather than a subcontracting one is that the 1996 FAIR Act, like its predecessors, provided statutory assurance that peanut growers who leased their property interest would be no worse off than those who subcontracted their interest. The 2002 Act deprived the Members of their reasonable reliance on the statute and took their property without providing the just compensation to which they are entitled. As a matter of policy, it is interesting to note that the entire controversy presented by the governmental taking in this action would have been avoided by prospective, as opposed to retroactive, application of the 2002 Act.

CONCLUSION

For the reasons stated, petitioners respectfully request that this Honorable Court grant the petition for a writ of certiorari to the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,
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